

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HASSAN T. ALI,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

CASE NO. C06-1798RSM

MEMORANDUM OPINION

Plaintiff Hassan T. Ali appeals to the District Court from a final decision of the Commissioner of the Social Security Administration (the “Commissioner”) denying his application for Supplemental Security Income benefits under Title XVI of the Social Security Act. For the reasons set forth below, the Commissioner’s decision is REVERSED and REMANDED for further proceedings.

I. PROCEDURAL HISTORY

Plaintiff filed an application for Supplemental Security Income (“SSI”) benefits on November 2, 2004. Tr. 58-63. Plaintiff alleged that he became unable to work on June 15, 1998 due to back problems, joint problems, hepatitis and depression. Tr. 58. His application for benefits was denied initially (Tr.36-38) and on reconsideration (Tr.40-41). On Plaintiff’s timely request, an initial hearing was held on March 29, 2006, before Administrative Law Judge (“ALJ”) Verell Dethloff. Tr. 309-331. Plaintiff appeared at the hearing and was represented by counsel. Tr.312-325. Plaintiff’s wife also testified at the proceedings. Tr. 326-331. The ALJ issued a

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1 decision on May 22, 2006, finding that Plaintiff was not disabled at any time through the date of
2 the decision and thus, not eligible for SSI payments. Tr.18-29. The Appeals Council denied
3 Plaintiff's request for review, making the ALJ's decision the final decision of the Commissioner.
4 Tr.4-7. Plaintiff timely filed his appeal with this Court.

5 II. THE PARTIES' POSITIONS

6 Plaintiff requests that the Court reverse the Commissioner's decision and remand for
7 award of benefits. Plaintiff argues that the ALJ erred by: (1) failing to consider Plaintiff's severe
8 central spinal stenosis as a severe impairment; (2) failing to find that Plaintiff's severe impairments
9 met or equaled a listing; (3) improperly concluded that Plaintiff is capable of performing his past
10 relevant work as a counselor; and (4) failing to give proper weight to the opinions of Dr. Peng
11 and Dr. Early. Defendant responds that the Court should affirm the Commissioner's final decision
12 because it is supported by substantial evidence and is free of legal error.

13 III. STANDARD OF REVIEW

14 The court may set aside the Commissioner's denial of social security disability benefits
15 when the ALJ's findings are based on legal error or not supported by substantial evidence in the
16 record as a whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence is
17 defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence as
18 a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
19 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving
20 conflicts in medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
21 1039 (9th Cir. 1995). Where the evidence is susceptible to more than one rational interpretation,
22 it is the Commissioner's conclusion which must be upheld. *Sample v. Schweiker*, 694 F.2d 639,
23 642 (9th Cir. 1982).

24 IV. EVALUATING DISABILITY

1 The claimant bears the burden of proving that he is disabled. *Meanel v. Apfel*, 172 F.3d
2 1111, 1113 (9th Cir. 1999). Disability is defined as the inability to engage in any substantial
3 gainful activity by reason of any medically determinable physical or mental impairment, which can
4 be expected to result in death, or which has lasted or can be expected to last for a continuous
5 period of not less than twelve months. 42 U.S.C. § 423 (d)(1)(A).

6 The Social Security regulations set out a five-step sequential evaluation process for
7 determining whether claimant is disabled within the meaning of the Social Security Act. *See* 20
8 C.F.R. § 416.1520. At step one, the claimant must establish that he or she is not engaging in any
9 substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). At step two, the claimant
10 must establish that he or she has one or more medically determinable severe impairments or
11 combination of impairments. If the claimant does not have a “severe” impairment, he or she is not
12 disabled. *Id.* at § (c). At step three, the Commissioner will determine whether the claimant’s
13 impairment meets or equals any of the listed impairments described in the regulations. A claimant
14 who meets one of the listings is disabled. *Id.* at § (d).

15 At step four, if the claimant’s impairment neither meets nor equals one of the impairments
16 listed in the regulations, the Commissioner evaluates the claimant’s residual functional capacity
17 and the physical and mental demands of the claimant’s past relevant work. *Id.* at § (e). If the
18 claimant is not able to perform his or her past relevant work, the burden shifts to the
19 Commissioner at step five to show that the claimant can perform some other work that exists in
20 significant numbers in the national economy, taking into consideration the claimant’s residual
21 functional capacity, age, education, and work experience. *Id.* at § (f); *Tackett v. Apfel*, 180 F.3d
22 1094, 1100 (9th Cir. 1999). If the Commissioner finds the claimant is unable to perform other
23 work, then the claimant is found disabled.

24 25 V. SUMMARY OF THE RECORD EVIDENCE

1 Plaintiff was 55 years old at the time of his initial hearing before the ALJ. He has
2 graduated from Junior College with an AA. Tr. 313. Plaintiff's prior work experience included
3 work as a counselor at a psychiatric halfway house. *Id.* Plaintiff indicates that his illnesses or
4 conditions began in June 1998, which is when he stopped working. *Id.* Plaintiff claims that he
5 cannot perform his job as a counselor because he has severe pains sitting down for long hours and
6 he is unable to constrain clients if they become aggressive. Tr. 73. Other evidence relevant to
7 Plaintiff's allegations is incorporated into the discussion below.

8 VI. THE ALJ'S DECISION

9 At step one, the ALJ found that Plaintiff has not engaged in substantial gainful activity
10 since the alleged onset of his disability. Tr.20. At step two, he found that Plaintiff has the
11 following severe impairments: lumbar spine degenerative disc disease and hepatitis C. *Id.* Noting
12 that these impairments gave the Plaintiff more than minimal functional limits, the ALJ concluded
13 that they are not medically determinable impairments. *Id.* The ALJ further noted that Plaintiff has
14 non-severe depression that cause him no impairments in "B" or "C" criteria. *Id.* At step three, he
15 determined that Plaintiff has no impairment, either singly or in combination, which meets or equals
16 the criteria of any listing in 20 CFR Part 404, Subpart P, Appendix 1. *Id.*

17 The ALJ found that the Plaintiff retains the residual functional capacity to lift and carry 20
18 pounds occasionally and 10 pounds frequently, and he also found that Plaintiff can stand or walk
19 for six hours in an eight-hour workday; sit for six hours in an eight-hour day, and do unlimited
20 pushing and pulling. Tr. 21. The ALJ further found that though Plaintiff cannot climb ladders,
21 ropes, or scaffolds, he can occasionally climb ramps and stairs, and that Plaintiff can occasionally
22 balance, stoop, kneel, crouch and crawl. *Id.* At step four, the ALJ found that Plaintiff is capable
23 of performing his past relevant work as a counselor. Tr. 29. Thus, he concluded that Plaintiff
24 was not disabled at any time through the date of the decision. *Id.*

25 VII. DISCUSSION

1 A. Plaintiff's Severe Impairments

2 Plaintiff argues that the ALJ erred in ignoring his lumbar spinal stenosis at step two of the
3 disability determination and failing to include it as a severe impairment. Defendant responds that
4 the ALJ did consider Plaintiff's spinal stenosis during the step two determinations, but did not find
5 the impairment to be severe.

6 A claimant's impairment is not severe if it does not significantly limit the claimant's
7 physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c), 404.1521(a).
8 Basic work activities are the abilities and aptitudes necessary to do most jobs, including (1)
9 physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or
10 handling; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out, and
11 remembering simple instructions; (4) use of judgment; (5) responding appropriately to
12 supervision, co-workers and usual work situations; and (6) dealing with changes in a routine work
13 setting. *See* 20 C.F.R. §§ 404.1521, 416.921. To satisfy step two's requirement of a severe
14 impairment, the claimant must prove the physical or mental impairment by providing medical
15 evidence consisting of signs, symptoms, and laboratory findings. *See* 20 C.F.R. §§ 404.1508,
16 416.908. An impairment or combination of impairments can be found "not severe" only if the
17 evidence establishes a slight abnormality that has "no more than a minimal effect on an
18 individual's ability to work. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988).

19 In the present case, the ALJ did not discuss the record relating to Plaintiff's spinal stenosis
20 at step two of the disability determination. Furthermore, he has not given any specific reasons for
21 not considering it a severe impairment.

22 Plaintiff claims that there is substantial evidence on record that he suffers from severe
23 spinal stenosis and that the stenosis is more than a slight abnormality. An MRI, done on August
24 2, 2003, revealed that Plaintiff had severe degenerative changes to the lumbar spine with severe
25 central canal stenosis at L3-L4 and L4-L5. Tr. 143. Further, Dr. Peng (Tr. 132) and Dr.

1 Williams (Tr. 265) diagnosed Plaintiff with severe spinal stenosis. Dr. Williams opined that he
2 was disabled from his janitorial job because of a combination of his spinal stenosis with other back
3 problems. Tr. 265, 264. On May 3, 2005, Dr. Peng felt that Plaintiff's functioning had
4 deteriorated severely due to his spinal stenosis and gave him a handicapped parking placard for
5 permanent disability. Tr. 231. Thus, the record establishes that Plaintiff has suffered from spinal
6 stenosis for more than twelve continuous months and that the spinal stenosis affected his ability to
7 work.

8 Defendant argues that Plaintiff's spinal stenosis is related to his degenerative disc disease
9 and that the ALJ did not consider spinal stenosis as a severe impairment because Plaintiff did not
10 provide any evidence of how his spinal stenosis effects his ability to work differently than his
11 degenerative disc disease. However, Plaintiff does not bear such a burden. In fact, at the step two
12 inquiry, the ALJ has a duty to consider the combined effect of all the claimant's impairments on
13 his or her ability to function, without regard to whether each alone was sufficiently severe.
14 *Smolen v. Chater*, 80 F.3d 1273, 1289-90 (9th Cir. 1996); *see also* 42 U.S.C. § 423(d)(2)(B); 20
15 C.F.R. §§ 404.1523, 461.923. Thus, the ALJ erred in failing to consider Plaintiff's spinal stenosis
16 as a severe impairment.

17 However, the ALJ's failure to list lumbar spinal stenosis as a severe impairment is not
18 reversible error because the ALJ considered it under step three and four of the sequential analysis.
19 *See Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005) (ALJ's error in failing to list obesity as a
20 severe impairment is not reversible where he considered obesity in determining whether it equaled
21 a listing and its effect on claimant's RFC). As discussed below, the ALJ did discuss whether
22 Plaintiff's stenosis met a listing. Tr. 20. Further, the ALJ also considered the effect of severe
23 spinal stenosis on his RFC. In discussing Plaintiff's RFC, the ALJ noted that an MRI revealed
24 Plaintiff suffered from severe spinal stenosis (Tr. 23-24), that Dr. Peng and Dr. William diagnosed
25 Plaintiff with severe spinal stenosis and that they found him disabled from a janitorial job. (Tr. 24).

1
2 Based on the record, the ALJ adequately considered Plaintiff's lumbar stenosis in his
3 sequential analysis of Plaintiff's impairments. Thus, although the ALJ erred in failing to consider
4 Plaintiff's lumbar stenosis as a severe impairment, it is harmless error.

5 B. Step Three Determination

6 Plaintiff argues that the ALJ failed to consider whether the combination of Plaintiff's
7 impairments equaled a listing and that the ALJ did not consider whether his lumbar spinal stenosis
8 met a listing.

9 If a claimant suffers from multiple impairments and none of them individually meet or
10 equal a listed impairment, the collective symptoms, signs, and laboratory findings of all the
11 claimant's impairments will be evaluated to determine whether they meet or equal the
12 characteristic of any relevant listed impairment. *See Marcia v. Sullivan*, 900 F.2d 172, 176 (9th
13 Cir. 1990). However, the "ALJ is not required to discuss the combined effects of a claimant's
14 impairments or compare them to any listing in an equivalency determination, unless the claimant
15 presents evidence in an effort to establish equivalence." *Burch v. Barnhart*, 400 F.3d 676, 683 (9th
16 Cir. 2005) *citing Lewis v. Apfel*, 236 F.3d 503, 514 (9th Cir. 2001). The claimant has the burden
17 of proving that he or she has an impairment that meets or equals the criteria of an impairment
18 listed in Appendix 1 of the Commissioner's regulations. *Id.* Further, a finding of equivalence
19 should be based on medical evidence only. *Lewis v. Apfel*, 236 F.3d 503, 514; 20 C.F.R. §
20 404.1529 (d)(3).

21 In the present case, the ALJ discussed whether each of plaintiff's impairments met a
22 listing, and not whether the combination of Plaintiff's impairments meets or equals a listing.

23 The Claimant does not have an impairment or combination of impairments that meets or
24 medically equals one of the listed impairments . . .

25 Claimant does not have a spine root disorder that gives him nerve root compression with
26 motor loss. He has some weakness but his subjective claims are not given much weight.
He does not have spinal arachnoiditis or lumbar spinal stenosis that results in

1 pseudoclaudation. His hepatitis C gives him only mild limits.
2 Tr. 20.

3 However, Plaintiff has not specified which listing he believes the combination of his
4 impairments meets or equals. Further, he has not set forth any evidence which would support a
5 diagnosis and findings of a listed impairment. Plaintiff's only evidence regarding the effects of his
6 hepatitis are his subjective claims of fatigue. *See Lewis v. Apfel*, 236 F.3d 503, 514 (deciding
7 that the ALJ did not err in concluding that plaintiff's condition did not equal a listing where
8 plaintiff did not point to any evidence to that end). Thus, the ALJ did not err in concluding that
9 Plaintiff's condition does not equal a listed impairment.

10 Further, the ALJ has considered Plaintiff's lumbar spinal stenosis at the third step of the
11 disability determination. The ALJ concluded that Plaintiff's lumbar stenosis does not cause
12 pseudoclaudation. Tr. 20. Pseudoclaudation is listed as a symptom of spinal stenosis under
13 Appendix 1, Subpart P, 1.04. It is manifested as pain and weakness, and may impair ambulation.
14 20 C.F.R. Part 404, Appendix 1, Subpart P, 1.04. Plaintiff has not produced any medical record
15 that exhibits this level of impairment. Thus, the ALJ did not err in considering whether Plaintiff's
16 lumbar stenosis met a criterion under the listing.

17 C. Past Relevant work

18 Plaintiff argues that ALJ erred in determining that he has the RFC to perform his past
19 relevant work as a counselor. He assigns three specific errors (1) the ALJ did not determine
20 whether Plaintiff retains the capacity to perform the functional demands and job duties either
21 peculiar to Mr. Ali's job or as ordinarily required by employers throughout the national economy,
22 (2) the ALJ failed to determine whether Plaintiff could work on a sustained basis, and (3) the ALJ
23 erred in finding Plaintiff's statements regarding the limitations of his symptoms not entirely
24 credible. Thus, the Plaintiff claims that ALJ failed to properly consider the effect of Plaintiff's
25 subjective symptoms on his RFC and, consequentially, his ability to do past relevant work.

26 1. Past Relevant Work

1 Plaintiff argues that the ALJ erred in failing to consider the functional demands of
2 Plaintiff's job as a counselor either as peculiar to his job or as ordinarily required throughout the
3 national economy. Step Four of the sequential evaluation consists of three phases. *Winfrey v.*
4 *Chater*, 92 F.3d 1017, 1023 (10th Cir. 1996). First, the ALJ must evaluate claimant's RFC. *Id.*
5 Second, he must determine the physical and mental demands of claimant's past relevant work. *Id.*
6 Third, he must evaluate whether claimant has the capacity to perform the job as described in
7 phase two, despite the limitations recognized in phase one. *Id.*

8 In the present case, the ALJ determined that the Plaintiff is capable of performing his past
9 relevant work as a counselor because it did not require performance of work-related activities
10 precluded by his RFC. Tr. 29. In making this determination, The ALJ gave great weight to the
11 state vocational expert's report that Plaintiff could return to his work as a counselor as he actually
12 performed it in the past. *Id.*

13 The ALJ did not carry out his own evaluation of the functional demands and job duties of
14 the Plaintiff's past relevant work. Further, he did not ask the Plaintiff about the functional
15 demands of his job at the hearing. The ALJ simply delegated his function at Step Four to the
16 Disability Adjudicator and quoted the latter's determination. "When an ALJ makes findings only
17 about the claimant's limitations and the remainder of the step four assessment takes place in the
18 [vocational expert's] head, we are left with nothing to review." *Pinto v. Massarani*, 249 F.3d
19 840, 847 (9th Cir. 2001). Because the ALJ has made very few findings of fact and delegated his
20 duty to the vocational expert, it is impossible to review his step four decision. Thus, this court
21 remands this issue and directs the ALJ to make specific findings regarding the functional demands
22 of the Plaintiff's past relevant work either as actually performed by him or as generally performed
23 in the economy. Furthermore, the ALJ should explain how the Plaintiff's determined RFC would
24 allow him to perform his past relevant work.

1 2. Sustained Basis

2 Plaintiff argues that the ALJ erred in failing to consider his ability to work on a sustained
3 basis. Ordinarily, RFC is an assessment of an individual's ability to do sustained work-related
4 physical and mental activities in a work related setting on a regular and continuing basis. Social
5 Security Ruling 96-8p (S.S. A. 1996). A regular and continuing basis means 8 hours a day, for 5
6 days a week, *or an equivalent work schedule. Id*

7 In the present case, Plaintiff's alleged work schedule of 10 hours per day for 4 days a
8 week, is equivalent to 8 hours a day, 5 days a week. Plaintiff does not point to any records that
9 suggest that he is not capable of working on a sustained basis. Thus, the ALJ did not err in
10 determining that Plaintiff can work on a sustained basis.

11 3. Credibility

12 Plaintiff argues that ALJ erred by finding his statements regarding the limitations of his
13 work symptoms not entirely credible. If a claimant has established an underlying impairment
14 which reasonably could be expected to produce the alleged subjective complaints and there is no
15 evidence of malingering, the ALJ must provide clear and convincing reasons for rejecting the
16 claimant's testimony. *See Smolen v. Charter*, 80 F.3d 1273, 1281 (9th Cir. 1996). General
17 findings are insufficient; rather, the ALJ must identify what testimony is not credible and what
18 evidence undermines the claimant's complaints. *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.
19 1993); *Varney v. Sec'y of Health and Human servs.*, 846 F.2d 581, 584 (9th Cir. 1988) (Varney
20 I). In assessing credibility, the ALJ may consider, for example: 1) ordinary techniques of
21 credibility evaluations, such as the claimant's reputation for lying and prior inconsistent statements
22 concerning the symptoms; 2) unexplained or inadequately explained failure to seek treatment or to
23 follow a prescribed course of treatment; 3) the claimant's daily activities; and 4) medical evidence
24 tending to discount the severity of subjective claims. *Rollins v. Massarani*, 261 F.3d 853, 856-57
25 (9th Cir. 2001).

1 In the present case, the ALJ found that Plaintiff's allegations regarding his limitations are
2 not totally credible. Tr. 21, 29. The ALJ identified a number of reasons for discrediting
3 Plaintiff's claim of total disability: (1) large gaps in medical record from 1997-2001, and no event
4 around June 1998 that correlates with the onset of Plaintiff's claimed total disability (Tr. 20), (2)
5 Plaintiff's subjective reports that he was feeling healthy during the period of his claimed total
6 disability (Tr. 22,23), (3) mild objective findings, consisting of a negative colonoscopy result and
7 Dr. Rosoff's findings that Plaintiff has mild Hepatitis C without significant bridging fibrosis (Tr.
8 23) (4) reports of activity inconsistent with claimed total disability such as walking, shooting
9 baskets and working outside (Tr. 23, 25); (5) record of Plaintiff having worked off the clock
10 during the period of disability as a janitor and running his own shirt screening business (Tr. 26),
11 and (6) increase in plaintiff's subjective claims of pain nearing his DLI, which were unsupported
12 by objective findings (Tr. 25).

13 Plaintiff argues that the ALJ erred in citing the gaps in his medical record as a reason to
14 doubt his credibility because he did not consider Plaintiff's explanation for not seeking regular
15 medical treatment. Plaintiff claims that his reasons for not seeking regular treatment are
16 sufficiently documented in the record, such as, his fear of epidural injections due to his past
17 experiences with spinal taps (Tr. 128; 313-314), his concerns with surgery were heightened when
18 the physician who performed his MRI told him that more people come out worse (Tr. 320) and
19 the fact that Neurontin prescribed by Dr. Williams made him sick and suicidal(Tr. 128 314).
20 However, these facts explain Plaintiff's failure to take the treatment prescribed after 2001, and not
21 his failure to seek any medication or treatment from 1998-2001, specially when Plaintiff claims
22 that his disability started from June 1998. Moreover, Plaintiff's wife's claim that Plaintiff did not
23 like to visit doctors and has to be pushed to visit doctors is neither legitimate nor supported by
24 record. In Plaintiff's medical records, Dr. Peng cites Plaintiff being too healthy as the reason for
25 not visiting doctors before 2001. Tr. 140.

1 Plaintiff argues that the ALJ should have obtained additional evidence to resolve the
2 discrepancy in his work history before assessing his credibility negatively on that basis. Plaintiff
3 also claims that the ALJ should have asked him about the conflict in evidence during the hearing.
4 In light of the fact that this court is remanding this matter for further proceedings Plaintiff will
5 have his opportunity to further develop the record as he sees fit.

6 D. Opinions of Treating and Examining Doctors

7 Plaintiff argues that the ALJ erred in failing to give proper weight to the opinion of his
8 treating doctor, Dr. Peng, and that the Commissioner erred in rejecting the opinion of his
9 examining physician, Dr. Early. When rejecting the uncontradicted opinion of a treating or
10 examining physician, the Commissioner must provide "clear and convincing" reasons for doing so.
11 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996)(citations omitted). If the treating or examining
12 physician's opinion is contradicted, then the Commissioner must provide specific and legitimate
13 reasons that are supported by substantial evidence in the record when rejecting this opinion. *Id.* at
14 830-31.

15 1. Dr. Peng's Disability Opinion

16 Dr. Peng has been treating Plaintiff since May 2001, for lower back pains, hypertension,
17 shoulder impingement, and Hepatitis C. On March 10, 2006, he wrote a letter stating that on his
18 last visit with the Plaintiff in May 2005, he had found the Plaintiff to be so severely disabled that
19 he gave him a handicapped parking placard for permanent disability. Tr. 270. He further opined
20 that Plaintiff would not be able to return to any gainful employment, unless he opts for surgery.
21 *Id.* Dr. Peng also wrote that Plaintiff could be considered for sedentary work, but that prolonged
22 sitting would not alleviate his pain, and any medications he would take for pain would impair his
23 concentration and judgment. *Id.* On March 24, 2006, Dr. Peng wrote an addendum to the letter
24 stating his opinion that Mr. Ali has been disabled since December 31, 2003. Tr. 271. Dr. Peng's
25 opinion is contradicted by that of state agency medical consultant Thomas Fleming, M.D., who
26

1 assessed that claimant could do light work with non-exertional limits. Tr. 207.

2 The ALJ gives zero weight to Dr. Peng's accommodating backdating of his endorsement
3 of disability because it seems to be solicited by Plaintiff's counsel. Tr. 27. The ALJ notes that
4 Dr. Peng needed prompting by Plaintiff's counsel to provide a note that claimant was disabled
5 since December 2003, since his original note stated that claimant could do sedentary work. *Id.*
6 "We have held the source of a referral to be relevant where there is no objective medical basis for
7 the opinion, *Bukhart v. Bowen*, 856 F.2d 1335, 1339 (9th Cir. 1988), and where there is evidence
8 of "actual improprieties" on the part of the doctor whose report the ALJ chooses to reject.
9 *Saelee v. Chater*, 94 F.3d 520, 523 (9th Cir.1996)." *Nguyen v. Chater*, 100 F.3d 1462, 1464
10 (9th Cir. 1996).

11 In the present case, there is no objective basis for Dr. Peng's accommodating backdating
12 of Plaintiff's onset of disability to December 2003. Dr. Peng examined Plaintiff on December 15,
13 2003 and did not discuss any signs of disability. Tr. 128. In fact, Dr. Peng found that plaintiff
14 was a well-appearing man in no acute distress who continued mildly uncomfortable. *Id.* Dr.
15 Peng claims that his backdating of plaintiff's disability is based on Dr. William's report that
16 Plaintiff's symptoms had accelerated since January 1, 2004. Tr. 270. However, Dr. Williams did
17 not make any such finding. In fact, after examining the Plaintiff on November 15, 2004, Dr.
18 Williams found no objective basis for Plaintiff's claims of increased pain since August 2003. *Id.*

19 The ALJ further noted that Dr. Peng's ongoing treatment notes do not indicate any
20 objective reasons for disability, and his opinion is not consistent with claimant's ongoing activities
21 which may have included running a shirt screening business. Tr. 27. Dr. Peng's opinion that the
22 Plaintiff is permanently disabled is based on his observations on May 3, 2005. Tr. 270. On that
23 visit, Dr. Peng had found that Plaintiff's symptoms had become so severe as to make him
24 permanently disabled. Tr. 231. However, Dr. Peng's notes for that visit do not indicate any
25 objective basis for the opinion. He did not carry out any tests that indicate that the plaintiff was
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1 permanently disabled. In fact, his opinion about Plaintiff's disability is based on Plaintiff's own
 2 subjective claims of pain and weakness, which have been properly rejected by the ALJ. The
 3 opinion of a physician that is premised to a large extent upon the claimant's own accounts of his
 4 symptoms and limitations may be disregarded when those complaints have been properly
 5 discounted. *Morgan v. Commissioner of the Soc. Sec. Admin.*, 169 F.3d 595, 601 (9th Cir.
 6 1999). Moreover, even though Dr. Peng has noted that Plaintiff's condition is worsening over the
 7 years of his treatment (2001-2005), he has never before concluded that the Plaintiff was disabled
 8 from all kinds of work. Thus, this court finds that the ALJ has given specific and legitimate
 9 reasons supported by the record, for discounting Dr. Peng's disability opinion.

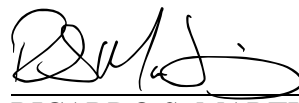
10 B. Dr. Early's opinion

11 Plaintiff submitted Dr. Early's report to the Appeals Council after the ALJ's decision.
 12 Dr. Early reviewed the Plaintiff's medical records, conducted Psychometrics and a mental status
 13 exam and diagnosed the Plaintiff with depression, anxiety and personality disorder. Tr. 299-305.
 14 Dr. Early concluded that Plaintiff met the criterion for 12.04 (affective disorders), 12.06 (anxiety
 15 related disorders) and 12.08 (Personality disorders) of the listings and should be found disabled.
 16 Tr. 305. The new evidence was made part of the record; however, the Appeals Council
 17 determined that it did not provide a basis for reversing the ALJ's decision. Tr. 5-6.
 18 However, since this matter is being remanded for further proceedings Plaintiff is free to submit
 19 Dr. Early's report to the ALJ for consideration.

20 VIII. CONCLUSION

21 Based on the foregoing discussion, the Court REVERSE'S and REMANDS this matter
 22 for further proceedings consistent with this opinion.

23 DATED this 31 day of March 2008.

24 

25 RICARDO S. MARTINEZ
 26 UNITED STATES DISTRICT JUDGE